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THE BEHRING SEA CONTROVERSY.<sup>1</sup>

BY HENRY FLANDERS, ESQ.

The sea and the air are the common property of mankind. They are universal elements, and generally are incapable of appropriation. Nevertheless, particular portions of the sea, by the approved usage of nations—which is the only recognized basis of international law—may become the subjects of exclusive proprietary right. Those particular portions of the sea which constitute the maritime territory of States are, as stated by authoritative writers on the law of nations, as follows :

(1) Ports, harbors, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same state.

(2) The sea along the coasts of a state as far as a cannon-shot will reach from the shore. This formerly was usually spoken of as a marine league, that being considered the extreme range of artillery. But the improvements in ordnance have been so great in recent years that the range has been doubled, and the limit of dominion thereby equally enlarged.

(3) Straits and sounds bounded on both sides of the territory of the same state, so narrow as to be commanded by cannon-shot from both shores, and communicating from one sea to another.

As to the last head, it should be observed, that a state thus situated with respect to straits which connect seas whose navigation is free to all the world cannot exclude other states from their use, inasmuch as they possess the right to communicate with each other.<sup>2</sup> In other words, they are jurisdictional waters, but the jurisdiction is not

<sup>1</sup>This statement of the case by Mr. FLANDERS will be followed in succeeding numbers of the AMERICAN LAW REGISTER AND REVIEW by papers presenting the case from the respective points of view of Great Britain and the United States.

<sup>2</sup>Wheaton's International Law (Boyd's Ed.), p. 251.

exclusive. The law of nations operates concurrently with the territorial law and admits the right of passage.

It should also be observed, that while the maritime territory of a state includes, generally speaking, the waters of gulfs and bays which indent its coasts, yet this observation must be limited by reference to the width of these waters at their mouths. In other words, the claim to territorial right does not include all portions of all gulfs and bays—gulfs and bays of great extent being assimilated to the open sea. ORTOLAN lays down the rule as follows:<sup>1</sup> "We should range upon the same line as ports and roads, gulfs and bays and all indentations known by other names, when these indentations made by the lands of the same state do not extend in breadth the double range of cannon, or when the entrance can be governed by artillery, or when it is naturally defended by islands, banks or rocks. In all these cases we can truly say that these gulfs or these bays are in the power of the nation which is the mistress of the territory surrounding them. This state is in possession; all the reasons which apply to ports and roads can be repeated here."

Delaware Bay and waters of like character would, obviously, fall within ORTOLAN'S rule, and Behring's Sea without it, unless, indeed, Russia had such a peculiar possession of that sea as to exclude other states from its common use. That is to say, she may possibly have had such an exclusive possession, with the tacit consent of other nations, as to give her an instituted right, and which right passed to the United States when she purchased the adjacent territory.

In the *Twee Gebroeders*,<sup>2</sup> Lord STOWELL, while stating the general principle that in the sea, out of the reach of cannon-shot, universal use is presumed, yet held that portions of the sea are prescribed for. Nevertheless, the general presumption, he said, bears strongly against such exclusive rights, and the title is a matter to be established

<sup>1</sup> *Diplomatie de la Mer*, vol. i., p. 145.

<sup>2</sup> 3 Rob., 339.

on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated, by clear and competent evidence.

If portions of the sea may be prescribed for, particular seas, it should seem, may equally be prescribed for. But the title in the one case, as in the other, must be proved by the same undoubted evidence.

The question then, is, whether there ever was such an exclusive possession of the Behring Sea by Russia, and with the tacit consent of other nations, as to give her proprietorship and dominion.

The question arises; and concerns chiefly Great Britain and the United States; the situation of their territory on the North American continent and their rights of navigation being involved in it, and demanding their action with respect to it.

In 1821 the Russian government, by an imperial ukase, prohibited all foreign vessels from approaching within 100 Italian miles of the coasts and islands then belonging to Russia in Behring Sea. This ukase was, doubtless, in the interest and at the instigation of the Russian-American Fur Company, a powerful corporation, originally chartered by the Emperor PAUL in 1799, and, by subsequent renewal of its charter, continuing to exist until 1862. The prohibition of the ukase was manifestly against common right. "We can say with assurance," says ORTOLAN, "that the open sea is not susceptible of being the property of man, because the open sea cannot be possessed. . . . The impossibility of property in the seas results from the physical nature of this element, which cannot be possessed and which serves as the essential means of communication between men. The impossibility of empire over the seas results from the equality of rights and the reciprocal independence of nations."

Surely, Russia had no inherent right to take parchment possession of 100 miles of the sea, and prohibit the vessels of all nations from navigating the same, or even from approaching within that distance of her coasts and

islands! If she had, then it must be conceded that she alone had the right of taking fish, seal and other products of the sea within the line of waters described by the ukase, and also that the United States, in purchasing her title, acquired all the rights appertaining to it. But having no inherent right to 100 miles of the sea off her coasts and islands, was her claim made valid by the assent and acquiescence of other nations? What nation has, ever by assent and acquiescence, admitted such claim, or expressly or by implication consented to it? By the convention of February 29, 1892, Great Britain and the United States have agreed to submit to arbitration these questions:—

(1) What exclusive jurisdiction in the sea now known as the Behring's Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

(2) How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

(3) Was the body of water now known as the Behring's Sea included in the phrase "Pacific Ocean," as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring's Sea were held and exclusively exercised by Russia after said Treaty?

(4) Did not all the rights of Russia as to jurisdiction, and as to the seal fisheries in Behring's Sea east of the water boundary, in the treaty between the United States and Russia of the 30th March, 1867, pass unimpaired to the United States under that Treaty?

(5) Has the United States any right, and if so, what right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit?

The first question relates to the exclusive jurisdiction and rights asserted and exercised by Russia in the Behring Sea prior and up to the time of the cession of Alaska to the United States. Claiming a right does not substantiate it. And hence the second question goes to the point whether Great Britain ever recognized and conceded such claim.

This is a crucial inquiry, and Great Britain maintains and will maintain before the arbitrators, that she never did the one or the other. She insists that directly after the ukase of 1821 the Russian government was warned that Great Britain did not, and would not, recognize the pretensions set up in that paper. When ambassador at Verona, in 1822, the Duke of WELLINGTON, in a note to Count NESSELRODE, stated the position of his government as follows: "We cannot admit the right of any power possessing the sovereignty of a country to exclude the vessels of others from the seas on its coasts to the distance of 100 Italian miles."

The government of the United States, on the other hand, contends that the protests of Great Britain, embodied in the note of the Duke of WELLINGTON, above quoted, and in a subsequent note to Count LIEVEN, had reference to the territory south of the Alaskan peninsulas bordering on the Pacific, and not at all to the Behring Sea. Moreover, the United States further contends, that the treaty of 1825, between Great Britain and Russia, did not relate to the Behring Sea. The article of that treaty germane to the subject is as follows:—

"ARTICLE I. It is agreed that the respective subjects of the high contracting parties shall not be troubled or molested in any part of the ocean commonly called the Pacific Ocean, either in navigating the same, in fishing therein, or in landing at such parts of the coast as shall not have been already occupied, in order to trade with the natives, under the restrictions and conditions specified in the following articles."

While admitting that the words "Pacific Ocean," in a certain sense, include Behring Sea, just as the words "Atlantic Ocean" include the Gulf of Mexico, the government of the United States insists, that although in a grammatical sense Behring Sea belongs to the waters of the Pacific Ocean, it is not technically a part of that ocean, any more than the Gulf of Mexico or the English Channel would, in common parlance, and according to the usage of the world,

be considered as included in the Atlantic Ocean. Besides, on higher ground, the United States maintains, that in a case of "proved necessity" they may go beyond the three-mile limit, and assert their sovereignty over the land and waters of Alaska. Great Britain joins issue upon all these points. She asserts, that so far as diplomatic representation went, she took every step which it was in her power to take "in order to make it clear to the Russian government that Great Britain did not accept the claim to exclude her subjects for 100 miles' distance from the coast, which had been put forward in the ukase of 1821."<sup>1</sup>

And he further asserts that the United States through Mr. ADAMS, Secretary of State under Mr. MONROE, took the same ground, and explicitly refused to recognize or to be bound by the pretensions of the Russian ukase. His words, addressed to the Russian Chancellerie in 1825, are as follows: "The pretensions of the Russian (Imperial) Government extend to an exclusive territorial jurisdiction from the 45th degree of North latitude on the Asiatic coast to the latitude of 51 North on the West coast of the American Continent, and they assume the right of interdicting the navigation and the fishing of all other nations to the extent of one hundred miles from the whole of the coast. The United States can admit no part of these claims."

Hence the contention of Great Britain is that the United States are now estopped to set up the Russian claim to territorial jurisdiction over Behring Sea, as part of her title, when she repudiated that claim and refused to be bound by it when Alaska belonged to Russia.

Moreover, she declares that the Treaty of 1825, the first article of which we have already quoted, "was intended to negative the extravagant claim that had recently been made on the part of Russia," and, in point of fact, did, by express stipulation, secure its renunciation. Great Britain, however, denies, even if the phrase "Pacific Ocean," used in the treaty of 1825, did not include Behring Sea, that her inherent rights to free passage and free fishing over a

<sup>1</sup> Lord SALISBURY'S Dispatch of February 21, 1891.

vast extent of ocean would be effectively renounced by mere reticence or omission. "The right," says Lord SALISBURY, "is one of which we would not be deprived unless we consented to abandon it, and that consent could not be sufficiently inferred from our negotiations having omitted to mention the subject upon one particular occasion."<sup>1</sup>

Nevertheless, Great Britain insists that Behring Sea was included in the term "Pacific Ocean" as used in the Treaty of 1825, and was intended to be so included; that it is as much a part of the Pacific Ocean as the Bay of Biscay is a part of the Atlantic Ocean; that giving a separate designation to a part of the ocean does not exclude it from the general designation, and that the term for the whole includes all the parts.

"If, then," says Lord SALISBURY, "in ordinary language, the Pacific Ocean is used as a phrase including the whole sea from Behring Straits to the Antarctic Circle, it follows that the 1st article of the treaty of 1825 did secure to Great Britain in the fullest manner the freedom of navigation and fishing in Behring Sea. In that case no inference, however indirect or circuitous, can be drawn from any omission in the language of that instrument to show that Great Britain acquiesced in the usurpation which the ukase of 1821 had attempted. The other documents which I have quoted sufficiently establish that she not only did not acquiesce in it, but repudiated it more than once in plain and unequivocal terms; and as the claim made by the ukase has no strength or validity except what it might derive from the assent of any power whom it might affect, it results that Russia has never acquired by the ukase any right to curtail the natural liberty of Her Majesty's subjects to navigate or fish in these seas anywhere outside territorial waters. And what Russia did not herself possess she was not able to transmit to the United States.

"Her Majesty's Government have, in view of these considerations, no doubt whatever that British subjects enjoy the same rights in Behring Sea which belong to them in every other portion of the open ocean."

<sup>1</sup> Dispatch of February 21, 1891.



It will be observed that the questions between the two governments are of such a character, and their imperative claims are so sharply opposed, that in the ordinary course of things one or the other must give way and abandon its pretensions, or war must needs result. Happily, they are to be determined by arbitration, and each government will have an opportunity to show by documentary evidence how much or how little it has encouraged or resisted the claim put forward by Russia in the ukase of 1821, to an exclusive jurisdiction of Behring Sea. If that jurisdiction should be sustained by the arbitration, then the question follows whether that jurisdiction, and the rights growing out of it, in respect to the seal fisheries, did not pass unimpaired to the United States, by the purchase of Alaska, in 1867?

The fifth and last question to be submitted to the arbitration is one of great interest and serious import. It is, whether the United States has any right, and, if so, what right of protection or property in the fur seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit? Great Britain admits that seals landing on the islands and the shores of the mainland, or found in the waters within cannon shot of the coast, cannot lawfully be captured by her subjects; not, perhaps, because they are, in a strict sense, the property of the United States, but because the citizens or subjects of other nations cannot invade her jurisdiction for the purpose of such captures. But she maintains that on their way to and from the islands and shores, outside the three mile limit, they may be taken by anybody, the same as salmon or cod, or any other product of the sea.

With respect to the general right of fishing, the two governments have held very different positions. The government of the United States has hitherto asserted that her fishermen may lawfully proceed within the bays, gulfs and coves that indent the coasts of the British Provinces, provided the headlands are more than six miles apart, and provided also they keep more than three miles from the shore. The

British government, on the contrary, has asserted her exclusive jurisdiction to all within the headlands, no matter how far apart they may be.

If the American claim as to the fisheries in general is applicable to the seal fisheries as well, then the present contention of the United States, apart from its claim arising from the Russian title, is inconsistent and embarrassing. But we cannot help thinking that the seal fisheries stand upon a different footing, and can be supported upon higher grounds. The right of protection or property in these seal fisheries must appeal strongly to the common instinct of justice and humanity. The ground upon which that right is based is thus generally stated by Mr. BLAINE:

“The Government of the United States holds that the ownership of the islands upon which the seals breed, that the habit of the seals in regularly resorting thither and rearing their young thereon, that their going out from the islands in search of food and regularly returning thereto, and all the facts and incidents of their relation to the island, give to the United States a property interest therein; that this property interest was claimed and exercised by Russia during the whole period of its sovereignty over the land and waters of Alaska; that England recognized this property interest so far as recognition is implied by abstaining from all interference with it during the whole period of Russia's ownership of Alaska, and during the first nineteen years of the sovereignty of the United States. It is yet to be determined whether the lawless intrusion of Canadian vessels in 1886 and subsequent years has changed the law and equity of the case theretofore prevailing.”<sup>1</sup>

<sup>1</sup> Mr. BLAINE to Sir JULIAN PAUNCEFORTE, April 14, 1891.